



The future of the Treaty Establishing a Constitution for Europe – a strategy for Poland

1. The debate on the future of the Constitutional Treaty

On 29 May 2005 French voters rejected the Constitutional Treaty (CT) in a national referendum. Three days later the Dutch did the same. Thus electorates in two European Union founding states placed a major question mark over the future of the Treaty which had been agreed by the leaders of 25 Member States and ceremonially signed by them in Rome seven months previously.

For the first time in the history of the EU so many Member States had decided to ratify a community treaty through a national referendum. For the first time a community document had to win the approval of ordinary voters across Europe on a major scale. It is worth noting that the CT was not written with voters in mind. The authors were tasked with creating a legal framework within which the member states and the European institutions could work together in an enlarged European Union. Analysts have pointed out EU structures are rooted in diplomacy and not in politics. Treaty negotiations aim at bringing about an agreement between member state governments. They are not designed to build popular support for the texts of negotiated documents. It seems, however, that referenda have appeared on the EU scene for good and that this will in future fundamentally change the way in which treaty documents are prepared.

This is the basic issue which faces the EU at present. In the great majority of Member States the debate is not about the content of the CT. The debate is about how to win the support of the public at large for the reforms in the CT in a democratic, credible and legitimate way. European leaders faced this challenge at the European Council in June 2005 and they decided not to risk any further defeats for the CT. Instead they put off the decision on the future of the CT and brought in a period of reflection which will last till June 2006.

The result of the referendum in France and Holland begs the question of whether the CT will ever come into force. After all it has to be ratified by all the Member States. It is worth mentioning here

that the 25 Member States have attached a declaration to the draft Treaty. This states that 'if two years after the signature of the Treaty establishing a Constitution for Europe, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter will be referred to the European Council'.

The CT has been ratified by 15 Member States (Austria, Belgium, Cyprus, Estonia, Greece, Spain, Lithuania, Luxembourg, Latvia, Malta, Germany, Slovakia, Slovenia, Hungary and Italy) and by two states which will join the EU in 2007 or 2008 – Bulgaria and Rumania. The CT has been rejected in two Member States: France and Holland. The ratification process has not been completed in eight countries. Finland is planning to ratify through parliament soon. The ratification process has been suspended in the Czech Republic, Denmark, Ireland, Poland, Portugal, Sweden and the United Kingdom.

The Member States which have ratified the CT do not want to see it abandoned. They argue that the ratification process should be completed in each EU country. The countries where the CT has been rejected declare that they will not renew the ratification process even though the results of parliamentary elections in Holland and presidential elections in France in 2007 could see a modification of this position. The Member States which have suspended the ratification process are faced with the decision to go ahead or to seek a European Council decision which would see the implementation of institutional reforms in the EU by other means.

On May 10 the European Commission presented its political proposals on the future of the debate on the CT after the close of the reflection period. The Commission suggests that work on the Treaty should resume in 2008. It also proposes the introduction of those reforms which are possible under present Treaty arrangements. These include an extension of those decisions which can be undertaken under a qualified majority and the preparation of a political declaration by EU leaders for the 50th anniversary of the signing of the Treaty of Rome.

Meanwhile the Commission of the Conference of Bishops of the European Community stated on

May 5 2006 that the 'debate on the future of Europe should concentrate on the Constitutional Treaty so as to facilitate ratification of the Treaty in all the Member States'.

In Poland the public political dialogue has, so far, seen little attention devoted to the future of the CT. The Foreign Ministry has said in reply to a parliamentary question that Poland does not aim to restart the ratification process in the immediate future. At present several government committees have begun work on preparing an official position on the CT for the EU summit on June 16 and 17th 2006. President Lech Kaczyński has said that he is in favour of the preparation of an entirely new Constitution.

A series of conferences organised jointly by the Institute of Public Affairs (ISP) and the Polish Institute of International Affairs (PISM) in the first half of 2006 served as a platform for an exchange of views on what Polish society and the authorities should do in the current situation. These meetings served as a good starting point for further, essential debates on the subject of institutional reforms in the EU in the country: in the government, in the political parties and in civil society at large.

Politicians from the government and opposition stated during our debates that the text of the CT is no longer an object of debate. "The CT in its present form is passé, it no longer exists and will not be revived. This doesn't exclude a return to a serious civic discussion with the participation of national representatives... but the issue should be discussed in a more sensible way, because the results of the last debate showed that the discussion till now has not been too intelligent" (a politician from the ruling Law and Justice party). An opposition politician put it this way: "I am convinced that the safest option for Europeans who want Europe to be united should be to end the period of reflection once and for all. I mean that a resumption of reflection will mean a resumption of destruction. That is what I am afraid of. I will be frank I would like to see the period of reflection to die". (a politician from the Civic Platform).

2. Possible scenarios:

The present debate in Europe shows that there are at least four possible basic scenarios for the future.

The first scenario: „Standing by the Constitutional Treaty” – this involves a continuation of the ratification process by the remaining Member States supplemented by a renewed ratification attempt by France and Holland in the wake of the introduction of any attachments such as annexes, declarations or protocols which are deemed to be necessary

✓ **Advantages:** The ratification of the CT in successive Member States would provide a way out of the present impasse and open the way to further enlargement. The continuation of the ratification process would respect the decisions of the citizens of those countries which have taken a position on the CT.

✓ **Threats:** problems with repeating the referenda in France and Holland and resistance to the CT in several Member States such as the United Kingdom, the Czech Republic or Poland which have yet to ratify could invalidate this option. Were the CT to be rejected in further Member States pressure would grow for the creation of a 'hard core' based for example on the euro group.

The second scenario: „a mini constitution” – this would involve the 'stripping out' of the CT of the main institutional reforms and their inclusion in a 'mini constitution' which would then be ratified by national parliaments.

✓ **Advantages:** The avoidance of ratification through referendum would increase the chances of implementing institutional reforms in comparison with the first scenario. The second scenario opens the way to the introduction of institutional solutions which are beneficial to Poland without going through lengthy negotiations with EU partners. Were this scenario to come to fruition then the rationale for a 'hard core' would disappear.

✓ **Threats:** It is not clear whether a transfer of key parts of the CT to a mini constitution would allow the reforms to retain their internal logic. This scenario risks drawing criticisms that democratic principles were being ignored by the avoidance of referenda. The issue of the double majority, which was criticised by Polish politicians would reappear, accompanied by a renewed defence of the system of weighted votes in the Council which is contained in the Nice Treaty.

The third scenario: a continuation of reforms without the implementation of the CT – this scenario would see the essential institutional changes such as the system of voting in the Council and the division of seats in EU institutions brought into the accession treaty with the 28th candidate state. This treaty would then be ratified by the parliaments of the Member States.

Other reforms would be brought in through agreements between Member States on a non treaty basis.

- ✓ Advantages: This scenario opens the way to intergovernmental negotiations on several essential institutional reforms. It also smooths the way to further enlargement of the EU and to the strengthening or establishment of EU policies dealing, for example, with energy security, migration or defence also on the basis of 'strengthened cooperation'. Changes which could be brought in without recourse to the CT would include an extension of qualified majority voting in certain fields, battle groups, the European Defence Agency, the fund for integration of citizens of third countries and a strengthening of OLAF.
- ✓ Threats: The extent to which reforms can be implemented on the basis of existing EU treaties is limited. It has been pointed out that it is impossible to bring in changes such as the legal personality of the EU, which would open the way to the ratification by the Union of the European Convention of Human Rights. Also an elimination of the pillar system involving solidarity in foreign affairs as well as in the area of freedom, security and justice would be difficult. The non democratic argument would also appear as critics would say that changes rejected by the citizens in referenda were being brought in by the back door. As in the first and second scenarios the problem of Poland accepting anew the double majority system would remain.

The fourth scenario: the preparation and ratification of a new constitution for the EU which would only in a limited way repeat the reforms contained in the present CT.

- ✓ Advantages: this would mean a new start with the full involvement of 27 Member States. The situation within the EU could stabilise in the time that it will take to prepare and agree the new treaty so that ratification will be easier.
- ✓ Threats: Negotiations over new solutions would last a long time with no certainty that a new compromise will be possible. In this scenario further enlargement of the EU will be suspended until such agreement is reached. As in previous scenarios the problem of Poland's renewed agreement to the principle of the dou-

ble majority, accepted in the CT by 25 Member States, remains.

3. Conclusions and recommendations for Poland.

- ✓ The renewal of the debate over the CT and the further ratification of the CT by successive countries such as Belgium, Estonia and with Finland soon to follow shows that the CT is not dead. Official declarations to the effect that the CT is defunct would put Poland on the margin of European debate and diminish our chances of shaping further institutional changes.
- ✓ We should also firmly reject proposals aiming at a rejection by the Polish parliament of the CT. It is not in Poland's interest to join France and Holland and voluntarily take on the odium of being one of those countries which put a brake on the integration process.
- ✓ Surveys of Polish public opinion consistently show strong support for Poland's membership of the EU. 68 per cent of Poles say that the European Union needs a constitution and 59 per cent think that the present CT 'is necessary to improve the functioning of the EU'. Parliament elected in the elections of autumn 2005 holds the opposite view. Only a national referendum would allow us to precisely define the views of Polish society in this respect. The results of such a referendum, irrespective of the turnout, should be binding on parliament
- ✓ Poland should identify which of the CT reforms which could be introduced on the basis of the current treaties, it is ready to accept. An example of such changes is the European Defence Agency which has already been established. The Finnish presidency in the second half of 2006 aims to open up the proceedings of the Council. Even though this is a CT provision it can be done under present treaties. It would also be useful to bring in other measures bolstering outside control over community institutions such as a strengthening of the role of national parliaments in accordance with the provisions of the CT. These and other measures not contained in the CT could bring about a growth in support for the EU among its citizens and help persuade public opinion that the EU is developing.
- ✓ Participants in the debates organised jointly by the Institute of Public Affairs and the Polish

Institute of International Affairs pointed to the possibility of immediate implementation of EU projects. These would be in the economic, foreign and internal security fields. However this needs political will. The European Commission is thinking along similar lines when it proposes initiatives in the field of justice and home affairs. The Commission calls the policy a 'Europe of results. Such a policy aims at increasing public support for necessary institutional changes. Poland should actively support such initiatives. Our country should also back proposals to extend qualified majority voting to the fields of justice and home affairs. We should support the establishment of a European consular service and also implement our existing commitments concerning such issues as the European Arrest Warrant which requires an amendment to our Constitution.

- ✓ Polish support for institutional reforms brought in on the basis of existing treaties should not be seen as a rejection of the CT. As of now the Polish government is bound by the fact that the country signed the CT in Rome. At this stage Poland should declare itself to be open to a wide ranging debate on institutional reform without closing the way to any of the above described scenarios.
- ✓ Independently of the scenario which will determine the fate of the CT, Poland will, sooner or later, face the problem of dropping its support for the Nice voting formulas in the Council. It should be noted at this point that the implementation of the Treaty of Nice has shown that even though Poland has almost as many votes as Germany and the other 'big' Member States, it appears that the crucial criterion in 'winning' decisions is not the number of votes an individual country has but the ability to build successful coalitions.
- ✓ Thus Poland should view 'Nice' as a negotiating chip for further talks with its EU partners. This is especially true of Germany which will take over the EU presidency in the first half of 2007. In exchange for agreeing to the 'double

majority' system Poland should look for the support of Germany and other Member States for further enlargement of the EU and for other Polish concerns relating to the 'Eastern dimension' or energy security.

- ✓ A natural opportunity for bringing in institutional reforms which require Treaty changes would be the enlargement of the EU to the 28th state which will in all probability be Croatia. It can be expected that Member States will want to reach a consensus on such changes before this takes place. Poland should be ready with its own demands before this eventuality occurs.
- ✓ The abandonment of Polish support for the system of weighting votes agreed at Nice would remove the main reason why Polish politicians opposed the CT. Fears that acceptance of the CT would lead to the transformation of the EU into a 'super state' have no basis in fact. Despite its title the CT remains an international treaty agreed between sovereign states and its ratification does not threaten our country's sovereignty.
- ✓ The fact that proposals for the introduction of institutional reforms outside the CT continue to appear means that we must decide on which changes we would like to see adopted. We must remember though that whatever path for change is chosen the starting point will be the reforms agreed in the CT.
- ✓ Poland should currently concentrate on looking for allies among the Member States for its vision of 'European Solidarity'. In this respect Polish policy should be governed by solidarity to its partners within the EU. A country's attitude to the CT is seen by many as a test of its approach to the European project. Thus support for the CT would make credible Poland's proposals for strengthening solidarity within the EU.

This report was prepared by a working group chaired by Krzysztof Bobiński (PISM) and Jacek Kucharczyk (ISP) with, Tadeusz Chabiera (PISM), Piotr Kaczyński (ISP) and Maciej Krzysztofowicz (PISM).